11-4450-16542-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Petition for Review of the Campaign Finance and Public Disclosure Board Notice and Order for Hearing regarding the Matter of 21st Century Democrats (National Association) and 21st Century Democrats (Minnesota Committee)

RULING ON RESPONDENTS' PETITION UNDER MINN. STAT. § 14.381

The above-entitled matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Petition filed by 21st Century Democrats on April 1, 2005. Michael J. Ahern and Michael R. Drysdale, Attorneys at Law, Dorsey & Whitney LLP, 50 South 6th Street, Minneapolis, MN 55402, appeared on behalf of the Petitioners, the National Association and Minnesota Committee of 21st Century Democrats. Gregory P. Huwe, Assistant Attorney General, NCL Tower, Suite 1800, 445 Minnesota Street, St. Paul, Minnesota 55101-2134, appeared on behalf of the Campaign Finance and Public Disclosure Board ("the Board"). The Board filed its response to the Petition on April 11, 2005, and the Petitioners filed a reply brief on April 14, 2005. Oral argument with respect to the Petition was heard on April 18, 2005, at the Office of Administrative Hearings. The parties submitted additional materials until June 8, 2005, at which time the record with respect to the Petition closed.

Based upon all of the files, records, and proceedings in this matter and for the reasons set forth in the attached Memorandum, IT IS HEREBY ORDERED as follows:

1. The Board shall cease enforcement of its unadopted rule requiring that contested case proceedings under Minn. R. 4525.0900 be held before the Board itself rather than before an Administrative Law Judge in accordance with Minn. Stat. Chapter 14.
2. The Board shall publish this decision in the State Register.
3. The Board shall bear the costs associated with this proceeding.

Dated: June 30, 2005

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Based upon the allegations in the Petition, the parties' written submissions, and oral argument heard in this matter, the underlying facts in this case appear to be as follows: 21st Century Democrats is a political committee that files reports with the Federal Election Commission and the Minnesota Campaign Finance and Public Disclosure Board. During the fall of 2004, the Board's staff inquired about certain contributions reported by the Petitioners.[1] The Board subsequently conducted an investigation under Minn. Stat. § 10A.02. The Board indicated in its initial response to the Petition and during oral argument that the investigation was conducted under Minn. Stat. § 10A.02, subd. 11.[2] The Board later stated[3] that the Board's investigation was conducted under "Minn. Stat. § 10A.02, subd. 9 and/or 10" because the investigation was initiated by the Executive Director and the Board itself and was not prompted by a written complaint from a person other than the Board.[4]

The Board eventually determined that the Petitioners had violated Chapter 10A of the Minnesota Statutes. The Board issued Draft Findings on December 17, 2004, imposing civil penalties against the Minnesota Committee and the National Association in the amounts of $292,950 and $25,000, respectively.[5] After the December Draft Findings were issued, local counsel for the Petitioners requested that the Board reconsider the Findings, met with the Board to discuss the matter, and submitted additional information to the Board. On January 20, 2005, the Petitioners filed an application for a writ of certiorari with the Court of Appeals, alleging procedural and substantive defects in the December 17, 2004, Draft Findings.[6] One of the allegations on appeal was that the Board had made the December Draft Findings without providing notice and opportunity to be heard as required under Minn. Stat. § 10A.02, subd. 11(b). After the Board indicated that further findings might be forthcoming and that the December 17, 2004, Draft Findings might be vacated or modified, the parties filed a Joint Stipulation for Stay of Appellate Proceedings Pending Further Agency Action. The Court of Appeals ultimately dismissed the appeal without prejudice and remanded the matter to the Board for further proceedings. In its Order, the Court of Appeals noted that it was clear from the joint motion and stipulation filed by the parties that "the parties agree that the existing decision [of the Board] is subject to additional proceedings and is not yet final." The Court of Appeals specified that the scope of review on any future appeal from a final decision on remand would include the December 17 order from which the appeal was taken.[7]

The Board subsequently reviewed the Petitioners' year-end report for 2004 and issued Amended Draft Findings in March of 2005 increasing the civil fines to $410,210 against the Minnesota Committee and $29,000 against the National Association.[8] These Draft Findings were provided to the Petitioners on March 18, 2005. At the Board's March 22, 2005 meeting, the Petitioners submitted written comments on the March Draft Findings, requested a contested case hearing pursuant to Minn. Stat. § 10A.02, subd. 13, Minn. R. 4525.0900, and Minn. Stat. § 14.57 – 14.62, and asked that the Board appoint an Administrative Law Judge to preside over the contested case.[9] The Board granted the request for a contested case hearing but declined to

appoint an Administrative Law Judge based upon prior Board practiceand precedent as well as the Board's interpretation that its rules do not require the appointment of an Administrative Law Judge. The Board instead issued a Notice of Hearing setting a contested case hearing for April 22, 2005, before the Board itself.[10] The date of the hearing was subsequently delayed by agreement of the parties. The Board apparently has not adopted the March Draft Findings.[11]

The Notice and Order for Hearing issued by the Board specified that the Board "has initiated this action to determine whether to make Findings of probable cause to believe that Respondent has violated provisions of Minn. Stat. Ch. 10A" and stated that "[s]uch Findings may include monetary penalties as provided in Minn. Stat. § 10A.27, subd. 13."[12] The Notice and Order also states that "a contested case hearing will be held . . . before the Board" and "[t]he hearing will be conducted pursuant to the contested case procedures set out in chapter 14 of the Minnesota Statutes, the Rules of the Board, Minnesota Rules Chapter 4525 (2003) and Minnesota Statutes § 10A.02, subd. 11."[13] The Notice and Order lists thirteen issues to be considered in the hearing, including whether the Petitioners violated various provisions of Chapter 10A and whether the National Association should have been referred to the Ramsey County Attorney for possible misdemeanor charges under the version of Minn. Stat. § 10A.27, subd. 13, in effect prior to Aug. 1, 2002.[14]

The Petitioners thereafter filed the pending petition with the Office of Administrative Hearings under Minn. Stat. § 14.381. Minn. Stat. § 14.381, subd. 1(a), specifies that a person may petition the Office of Administrative Hearings to seek an order of an Administrative Law Judge determining "that an agency is enforcing or attempting to enforce a policy, guidelines, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule." Subdivision 1(b) states that "[a]n agency determination is not considered an unadopted rule when the agency enforces a law or rule by applying the law or rule to specific facts on a case-by-case basis." If the Administrative Law Judge determines that an agency is enforcing or attempting to enforce an unadopted rule that is the subject of a petition, the Administrative Law Judge must, under subdivision 2, direct the agency to cease enforcement of the unadopted rule. The order must be served upon the parties and the Legislative Coordinating Commission by first class mail and must be published by the agency in the State Register.

I. Overview of Parties' Primary Contentions

In their petition, the Petitioners assert that the Administrative Law Judge should direct the Board to cease enforcement of the unadopted rule that is the subject of the Petition by refraining from holding the hearing before the Board as scheduled, and require the Board to refer the contested case petition to the Office of Administrative Hearings for the appointment of an Administrative Law Judge and proceedings consistent with Chapter 14 of the Minnesota Statutes. The Petitioners argue that Minn. Stat. § 10A.02, subd. 13, makes Chapter 14 of the Minnesota Statutes (the Minnesota Administrative Procedure Act or "APA")[15] applicable to the Board and thus Chapter 14

sets forth the procedures to be followed where, as here, the Board grants a request for a contested case hearing. The Petitioners also argue that, in the absence of an Administrative Law Judge, the Board will be sitting in judgment of its own conduct, with no impartial fact-finding by an Administrative Law Judge who is independent of the Board. Since the Board initiated the investigation of the Petitioners and itself prepared the proposed findings prior to the initiation of the contested case, the Petitioners contend that the Board is acting as a "party" under Minn. R. 4525.0100, subp. 5,[16] and cannot sit in judgment of itself without the aid of the impartial Administrative Law Judge envisioned by Minn. Stat. § 14.50.[17]

In response, the Board points out that the only express reference in Chapter 10A to "contested case" hearings by the Board is contained in Minn. Stat. § 10A.20, subd. 10 (which specifies that the Board "must hold a contested case hearing" if there is an objection to a Board order granting an association or individual an exemption from disclosure of contributions to avoid economic reprisal, loss of employment, or threat of physical coercion). The Board asserts that these exemption matters are the only instance in which chapter 10A requires the Board to hold a contested case hearing, and that any other hearings are granted at the discretion of the Board. The Board contends that the statement in Minn. Stat. § 10A.02, subd. 13 that "Chapter 14 applies to the board" and "[t]he board may adopt rules to carry out the purposes of this chapter" does not require the agency to provide contested case hearings in other situations, and argues that, at most, this provision requires the Board to comply with rulemaking procedures set forth in the APA, requires the contested case procedures set forth in the APA to be used in connection with hearings on exemption matters required by Minn. Stat. § 10A.20, subd. 10, and makes any appeal from a Board decision subject to Minn. Stat. §§ 14.63-14.69. Although the Board acknowledges that § 10A.02, subd. 11(c), refers in passing to "a hearing or action of the Board,"[18] it contends that the statute does not "require" any hearing at all with respect to matters arising out of Board investigations.

The Board also argues that Minn. R. 4525.0100 defines "contested case" differently than does Minn. Stat. § 14.01, subd. 3, since it refers to board hearings rather than hearings conducted by an Administrative Law Judge, and points out that the rules do not incorporate or refer to the procedures established under the APA. The Board asserts that the Board has never interpreted its own rules to require contested case proceedings to be conducted by an Administrative Law Judge under APA procedures, but has always heard "such hearings as have been held" itself. The Board asserts that this amounts to a long-standing agency interpretation of its own rules that is entitled to substantial deference. Finally, the Board argues that the factual record has been fully developed, none of the material facts are in dispute, the only issues remaining to be resolved are legal and constitutional issues, and there is no need for a contested case hearing before an Administrative Law Judge in such a situation. The Board points out that the Petitioners will be afforded a further opportunity to supplement the record with any additional facts or arguments at the Board hearing, and the Board's final action will be subject to judicial review.

The Board filed with its response in opposition to the Petition an affidavit of Jeanne Olson, Executive Director of the Board. Ms. Olson indicated that, during her 23-year tenure with the Board, the Board has never, to the best of her recollection, ordered a contested case hearing to be conducted by an Administrative Law Judge from the OAH in connection with an investigation or proceeding of the Board pursuant to Minn. Stat. § 10A.02, subd. 11, Minn. Rules 4525.0010 – 4525.1000, or any predecessor statutes or rules.[19] She also stated that no contested case proceedings before an Administrative Law Judge have been held with respect to the Findings issued by the Board in 147 matters since January of 1999. In many of those matters, Ms. Olson indicated that evidentiary hearings and/or oral arguments were conducted by and made directly before the Board, which then proceeded to issue findings.[20]

During oral argument, the Board indicated that, at most, there have been a "handful" of requests for formal hearings in the past. In some instances, sworn oral testimony has been given and documents have been received into evidence; in other instances, the parties have simply appeared at a Board meeting to discuss or argue the issues. The Board admitted that, to its knowledge, no party besides the Petitioners has ever requested a contested case hearing under Minn. R. 4525.0900 or sought appointment of an Administrative Law Judge to preside at a hearing.

II. Discussion

In general, an agency is not deemed to have engaged in rulemaking if its interpretation of a statute or rule coincides with the plain meaning of that statute or rule.[21] In other words, if an interpretation is consistent with the plain meaning of the statute or rule that is being interpreted, the agency action is authorized by the statute or rule itself, and the fact that no rule was adopted does not render the interpretation invalid.[22] However, if an agency's announced policy is inconsistent with the statute or rule, the courts have often invalidated that policy. And, if the policy makes new law without the public input required by the APA, the policy will be invalidated. The question presented here is whether or not the Board's policy requiring that "contested case" hearings granted under Minn. R. 4525.0900 be held only before the full Board and not before an Administrative Law Judge is a permissible interpretation of Chapter 10A and Minn. R. 4525.0900, consistent with their plain meaning, or whether it constitutes the improper adoption of a new rule because the policy impermissibly conflicts with or extends Chapter 10A or Minn. R. 4525.0900.[23]

The Petitioners' request for a contested case hearing was granted under Minn. R. 4525.0900. That rule states as follows:

> Subpart 1. **Initiation by application.** Any person requesting an exemption under Minnesota Statutes, section 10A.20, subdivisions 8 and 10, or any other person whose rights, privileges, and duties the board is authorized by law to determine after a hearing, may initiate a contested case by making application. Except in anonymous proceedings, an application shall contain: the name and address of the applicant; a

> statement of the nature of the determination requested including the statutory sections on which the applicant wishes a determination made and the reasons for the request; the names and addresses of all persons known to the applicant who will be directly affected by such determination; and the signature of the applicant.
>
> Subp. 2. **Initiation by board order.** Where authorized by law, the board may order a contested case commenced to determine the rights, duties, and privileges of specific parties.

It appears that the Petitioners initially filed a "petition" for a contested case hearing under subpart 1 of the rule, and the Board thereafter granted the request and issued the Notice of and Order for Hearing.

In considering the issues raised in this case, it is helpful as a threshold matter to review the background of the Minnesota APA, Minn. Stat. § 10A.02, and Minn. R. 4525.0900. Prior to 1945, each state agency had its own procedures for implementing and enforcing rules.[24] In 1945, limited legislation addressing rulemaking by state agencies was passed.[25] In 1957, the first codified APA was enacted.[26] In 1974, Chapter 15 (the predecessor to Chapter 14) specified that "[e]ach agency may adopt appropriate rules of procedure for notice and hearing in contested cases."[27] At that time, hearings were typically held under before the agency itself or before "hearing examiners" employed by the agency involved in the case.[28] The 1974 and 1975 sessions of the Minnesota Legislature enacted the first major revision of the APA.[29] Chapter 15 was amended on June 4, 1975, to create an independent agency then called the State Office of Hearing Examiners, and to require that contested cases be assigned to independent hearing examiners appointed by the chief hearing examiner.[30] The amendment requiring agency use of hearing examiners was effective on January 1, 1976.[31] The 1976 version of Chapter 15 no longer authorized each agency to develop its own rules of procedure for contested cases.[32] Early in 1982, the Legislature passed a law indicating that, "[i]f the revisor of statutes recompiles the administrative procedure act as a separate chapter in Minnesota Statutes, he may change references to 'chapter 15' or other references to sections or series of sections in Minnesota Statutes or in administrative rules publications to references to the new chapter if the context indicates that a reference to the administrative procedure act is intended."[33] Before the publication of the 1982 Minnesota Statutes, the revisor exercised the discretion given him by the Legislature and recodified the APA into a separate chapter, Chapter 14 of the Minnesota Statutes.[34] The name of the Office of Hearing Examiners eventually was changed to the Office of Administrative Hearings[35] and the title of Hearing Examiner was changed to Administrative Law Judge.[36] The term "contested case" has been consistently defined since 1974 in Chapter 15 and later in Chapter 14 of the Minnesota Statutes to mean "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."[37]

Chapter 10A was enacted in 1974.[38] As originally enacted, Minn. Stat. § 10A.02, subd. 13, specified that "[t]he provisions of chapter 15, shall apply to the commission[39] including the power to prescribe rules and regulations to carry out the purposes of sections 10A.01 to 10A.34."[40] In 1978, section 10A.02, subd. 13, was amended to read, "The provisions of chapter 15 apply to the board. The board may promulgate rules to carry out the purposes of sections 10A.01 to 10A.34."[41] That provision was revised to refer to Chapter 14 rather than Chapter 15 by the time of publication of the 1982 version of Minnesota Statutes.

It is more difficult to trace the precise history of rules of the vintage of Minn. R. 4525.0900 and the other rules adopted by the Board prior to 1976, since agencies were not required at that time to engage in formal rulemaking procedures, rules were not codified, and publication of the State Register had not yet begun.[42] At the request of the Administrative Law Judge, counsel for the Board submitted copies of Statements of Need and Reasonableness (SONARs) relating to the Board's past rule revisions. The SONARs dated November 24, 1986, and November 30, 1987, and the Board's 1975 Statement in Support of EC 401-423, were signed and appeared to be in final form. Some of the other SONARS submitted by the Board were not signed or dated, and it is possible that they merely were preliminary drafts. These materials do, however, shed some light on the history and likely dates of adoption of the Board's rules as well as the manner in which the Board has previously interpreted rules that grant the Board discretion to order "contested case" proceedings.

The SONARs provided by the Board indicate that, in 1975, the Board adopted, with some modifications, model hearings rules drafted by the Office of the Attorney General. These rules were originally numbered EC 401 - 423.[43] Significantly, the Board's 1975 statement in support of the proposed rules acknowledged that the Board "is authorized by Minn. Stat. § 10A.02, subd. 13 (1974) to conduct contested case proceedings consistent with the requirements of Minn. Stat. Chapter 15."[44] Thus, it was recognized by the Board at the time that section 10A.02, subd. 13, made the precursor of Chapter 14 applicable not only to the Board's rulemaking proceedings but also to its contested case proceedings.

It appears that EC 401 – 423 were later renumbered EC 601 – 623. EC 605, entitled "Initiating a Contested Case," was substantially similar to current rule 4525.0900. EC 604(a) specified that, "[i]n cases to which the Commission is not a party, the Commission may elect to serve itself as hearing officer. In any cases in which the Commission does not serve as the hearing officer, the Commission shall appoint a hearing officer within the time provided in EC 607." EC 604(b) and (c) indicated that, in cases to which the Commission was a party, the hearing officer "shall not at the time of appointment be an employee or member of, or on retainer to, the Commission" and that such a hearing officer would thereafter "hear the case and recommend findings of fact and a final decision to the Commission."

The SONARs submitted by the Board indicate that the rules now codified as Minn. R. 4525.0100 through 4525.1000 were adopted in 1976 and were further

amended in 1982, 1986, and 1987.[45] In 1977, the Board announced that EC Rules 601, 604, and 607 through 623 were repealed based upon the Board's view that they were "superseded by the hearing rules of the Office of Hearing Examiner as provided in Minn. Stat. § 15.052, subd. 4 (1976)."[46] Thus, the EC rules addressing hearing officers, commencement of a contested case, answer, right to counsel, informal disposition, default, intervention, consolidation, discovery, service of motions, disqualification, prehearing conference, notice of hearing, the hearing, the Commission decision, rehearing, appeal by Commission, and emergency procedures were deemed to be superceded by what was then Chapter 15. At that time, the Board retained the provisions relating to definitions (EC 602); complaints, investigations, and audits (EC 603)[47]; applications and Board orders initiating a contested case (EC 605, now Minn. R. 4525.0900; and the initiation of anonymous proceedings (EC 606). While the Board apparently did not at the time view Chapter 15 as superceding EC 605 (which was substantially the same as Minn. R. 4525.0900) or the discretionary hearings recognized in EC 603, that view is understandable since those rules authorize the Board to grant discretionary petitions for contested case proceedings and thus had no counterpart in Chapter 15.

After careful consideration, the Administrative Law Judge concludes that the Board's policy requiring that "contested case" hearings granted under Minn. R. 4525.0900 be held before the full Board and not before an Administrative Law Judge impermissibly conflicts with the Legislature's express directive in section 10A.02, subd. 13, that "Chapter 14 applies to the Board." [48] In *Waters v. Putnam*,[49] the Minnesota Supreme Court held that a statutory command that "all proceedings before the [water resources] board shall be in conformity with [Chapter 15]" warranted a determination that a proceeding to establish a watershed district was properly classified as a "contested case or proceeding," and that there thus was a right of appeal under Minn. Stat. § 15.0424 (1967) from the order that had been issued by the Water Resources Board. There isno material difference between the directive involved in *Waters* and the directive in Chapter 10A that "Chapter 14 applies to the board." Minn. Stat. § 14.50 requires that "[a]ll hearings of state agencies required to be conducted under this chapter shall be conducted by an administrative law judge assigned by the chief administrative law judge" and specifies that it is the duty of the Administrative Law Judge in such cases to "see to it that all hearings are conducted in a fair and impartial manner. . . ." The Board's own rules provide that an aggrieved person may initiate a "contested case," and the term "contested case" is separately defined in Minn. R. 4525.0100, subp. 3, in a fashion that is virtually identical to the definition that was then contained in Chapter 15 and is now contained in Chapter 14.[50] The term "contested case" has become a term of art in Minnesota, and the procedural protections that accompany contested cases are well-understood. While Minn. R. 4525.0100, subp. 3, gives the Board discretion to decide whether or not to grant a party's application for a "contested case" hearing, nothing in the Board's statutes or rules suggests that, once the application is granted, the Board may deviate from these well-understood procedures. As Minnesota courts have noted, the APA itself does not provide a right to a contested case hearing, but does establish the procedures to be followed when another statute provides such a right.[51] It should be equally the case that the APA

establishes the procedures to be followed when an agency grants a petition for a contested case proceeding under a rule such as Minn. R. 4525.0900, particularly where the agency's governing statute specifies that Chapter 14 applies to the agency.

The Administrative Law Judge is not persuaded by the Board's attempt to argue that the type of "contested case" referred to in Minn. R. 4525.0900 is different from the type of "contested case" referred to in Chapter 10A. There simply is no logical basis in the statute and rules for the Board to treat a contested case hearing under Rule 4525.0900 differently than those granted under other rules or other portions of its governing statute. Nothing in Chapter 10A, Chapter 14, or the Board's rules suggests that hearings granted under Minn. R. 4525.0900 are exempted from Minn. Stat. § 14.50 or the other requirements of the APA.[52] To the contrary, as pointed out more fully below, the Board has made it clear in its SONARS supporting changes in other rule provisions granting the Board the discretion to order contested case proceedings that the type of proceeding contemplated was one consistent with Chapter 14. Moreover, in light of the subsequent amendment of Chapter 10A to make it clear that Chapter 14 applies to the Board, there would be no proper basis, in the view of the Judge, to ignore that directive and determine that the only type of hearing available under the rule is the type that may have been typical at the time of the rule's original promulgation in 1975. Even though the precursor to Rule 4525.0900 was adopted at a time before the APA required hearings before independent Administrative Law Judges, the Board cannot, in effect, ignore the impact of supervening legislation under the guise of enforcing what it now argues was common practice when the rule was originally adopted. In fact, the Board's current policy is at odds with the Board's prior rule (EC 604) which suggested that, even prior to the creation of OAH and independent Administrative Law Judges under Chapter 14, the Board was of the view that it would not be proper for the Board to serve as a hearing officer if the Board was also a party in a case.

The 1987 SONAR relating to the Board's amendments to Minn. R. 4525.0200, subp. 6, and 4525.0500, subp. 3, provides further support for the view that contested case proceedings granted in the discretion of the Board under the Board's rules should comply with Chapter 14. Minn. R. 4525.0200, subp. 6 (which states that, "[a]t any time during an investigation of a complaint, the board may hold a contested case hearing before making a finding on the complaint"), and Minn. R. 4525.0500, subp. 3 (which states that, "[a]t any time during an investigation or audit, the board may hold a contested case hearing before making a finding on any investigation or audit") had their roots in a prior rule provision (EC 603(b)(4)), which was later codified as Minn. R. 4525.0600 and was repealed in 1987, at the same time that 4525.0200, subp. 6, and 4525.0500, subp. 3, were adopted.[53] The Board's 1987 SONAR supporting additional amendments to these rule provisions indicated that these rule provisions were proposed to "clarify and ensure that a contested case hearing be held when required" and were "consistent with the requirements of the state Administrative Procedures Act, Minn. Stat. Ch. 14, regarding contested cases."[54] Although these rules are not directly involved in the current proceeding because the contested case hearing here was sought and granted under Minn. R. 4525.0900, they, like Minn. R. 4525.0900, provide the Board with the discretion to order a "contested case" hearing in certain situations. It is evident

from the 1987 SONAR that the Board recognized that the type of contested case proceeding encompassed under those rules would be one that would be consistent with Chapter 14. There is no logical basis to differentiate hearings ordered by the Board under 4525.0900 from those ordered under 4525.0200 or 4525.0500.

The Board has not established that its approach in the current case reflects a longstanding interpretation of Rule 4525.0900 that is entitled to deference. As noted above, the Board admitted during oral argument that it is not aware of any prior instance in which a party has requested or been granted a contested case hearing under 4525.0900. The Petitioners apparently are the first to request a contested case hearing and seek appointment of an Administrative Law Judge under the rule. The Affidavit of Ms. Olson merely suggests that other parties who have been the subject of Board Findings since 1999 have been content to simply present their positions to the Board itself. There are no written documents reflecting the Board's interpretation, and no prior applications of that interpretation to which the Board can point. As a result, the Board has never before had occasion to interpret whether, where an application for a contested case hearing is granted, the hearing is to be governed by Chapter 14; instead, it is evident that the Board is devising an approach for the purposes of this case for the first time. This lends further support to the conclusion that the Board is attempting to apply an unadopted rule.

The Petitioners contend that there are disputed issues of fact in this case regarding whether any violations were "inadvertent" and the dates and details of communications between Petitioners and Board staff. The Board disputes that intent is a relevant issue and contends that an evidentiary hearing is not necessary. Whether or not there are material facts in dispute is not determinative of the availability of a contested case hearing here. The Board has already granted the Petitioners' application for a contested case hearing under Minn. R. 4525.0900. In addition, in contrast to the rules involved in some of the cases cited by the Board, Minn. R. 4525.0900 does not require that there be a dispute regarding a material issue of fact in order for a contested case hearing to be ordered.[55] Even if an Administrative Law Judge is appointed to preside in this matter, the parties would be able to bring motions for summary disposition if they believe that there are no material issues of fact in dispute.[56]

Accordingly, the Administrative Law Judge concludes that the directive in Minn. Stat. § 10A.02, subd. 13, that "Chapter 14 applies to the board" provides a sufficient basis for concluding that where, as here, the Board has granted a party's request for a contested case proceeding under Minn. R. 4525.0900, the procedures to be followed are those set forth in Chapter 14. Any other approach would be inconsistent with the statute and would improperly allow the Board to interpret its rule in a manner that is inconsistent with the directives of the Legislature in Chapters 10A and 14. Rules are defined as "every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure."[57] The policies of the Board that are being questioned in this case fall within the meaning of this definition because they implement

and make specific Chapter 10A and the procedures to be followed if an application for a contested case hearing is granted under Minn. R. 4525.0900. The Board's policy that the portion of Chapter 14 requiring the appointment of an Administrative Law Judge is not applicable to contested case hearings granted under Minn. R. 4525.0900 regarding the use of an Administrative Law Judge constitutes the improper adoption of a new rule because it does not restate or comport with the plain meaning of Chapter 10A or Minn. R. 4525.0900. Instead, the Board's policy goes beyond the statute and rule and adds to their requirements. This can only be done through legislation or rulemaking under the APA. Thus, the Board is ordered to cease enforcement of its unadopted rule that contested case hearings granted under Minn. R. 4525.0900 will only be held before the Board itself.[58]

B.L.N.

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[1] See September 28, 2004, Memorandum from L. Drilias, Compliance Officer, Campaign Finance and Public Disclosure Board, to M. Lux, Treasurer of 21st Century Democrats (attached to the Board's Response to Petition).

[2] Minn. Stat. § 10A.02, subd. 11, authorizes the Board to investigate alleged violations of Chapter 10A. The statute requires that the Board make a public finding of whether there is probable cause to believe a violation has occurred within a specified period of time following the filing of a complaint. The statute also requires that the Board notify the individual or association of the fact of the investigation within a reasonable time after beginning an investigation, inform the individual or association of the nature of the allegations, and afford an opportunity for the individual or association to answer the allegations before making a finding of whether there is probable cause to believe a violation has occurred. Counsel for the Board indicated during oral argument that, while no complaint was received from a third party, the Board views its own initiation of an investigation to be based upon its own "complaint."

[3] See June 8, 2005, letter to the Administrative Law Judge from counsel for the Board.

[4] Minn. Stat. § 10A.02, subd. 9, states that the Board's Executive Director must inspect all material filed with the Board as promptly as necessary to comply with Chapter 10A and other legal requirements mandating the filing of a document with the Board and notify the individual if a written complaint is filed with the Board or it otherwise appears that a document filed with the Board is inaccurate or not in compliance with Chapter 10A or that there has been a failure to file a required document. Minn. Stat. § 10A.02, subd. 10, authorizes the Board to "make audits and investigations with respect to statements and reports that are filed or that should have been filed" under Chapter 10A and further empowers the Board to issue subpoenas and seek enforcement of subpoenas.

[5] December 17, 2004, Findings Regarding the National and Minnesota Committee of the 21st Century Democrats (attached to the Board's Response to Petition).

[6] Affidavit of Michael J. Ahern in Support of Petition, ¶ 8.

[7] *See* Feb. 16, 2005, Order of the Court of Appeals, attached to the Petitioners' June 8, 2005, letter to the Administrative Law Judge.

[8] Id., ¶ 9; April 1, 2005, see also Letter to T. Ashmore from M. Ahern and M. Drysdale, attached to Petitioners' Reply Brief and Amended Draft Findings dated March 22, 2005, attached to Petitioners' Reply Brief.

[9] March 22, 2005, Letter to T. Ashmore from M. Drysdale (attached as Ex. A to the Affidavit of M. Ahern). The first paragraph of the letter referred to Minn. R. "4524.0900," but that was an apparent typographical error, since there is no such rule. The rule was correctly cited as 4525.0900 in the second paragraph of the letter.

[10] Affidavit of M. Ahern, ¶¶ 3, 9; Notice and Order for Hearing (attached as Ex. B to Affidavit of M. Ahern). The last paragraph of the Notice and Order, p. 5, mentions that "the administrative law judge" must be promptly notified if any party requires an interpreter. Counsel for the Board clarified during oral argument on the Petition that the reference to an ALJ was an error that occurred during the "cutting and pasting" process of preparing the Notice and Order for Hearing.
[11] *See* June 8, 2005, letter to the Administrative Law Judge from counsel for the Board.
[12] Notice and Order for Hearing at 1.
[13] *Id*.
[14] *Id*. at 3-4.
[15] The APA is set forth in Minn. Stat. §§ 14.001-14.69.
[16] Minn. R. 4525.0100, subp. 5, defines the term "party" to mean "a person whose legal rights, duties, or privileges may be determined in a contested case. 'Party' includes the board except when the board participates in the contested case in a neutral or quasi-judicial capacity only. . . ."
[17] The Petitioners also contend that they are entitled to appointment of an Administrative Law Judge as a matter of due process. The Administrative Law Judge lacks jurisdiction to decide this claim.
[18] Minn. Stat. § 10A.02, subd. 11(c) states, "A hearing or action of the board concerning a complaint or investigation other than a finding concerning probable cause or a conciliation agreement is confidential. . . ."
[19] See Affidavit of Jeanne Olson, ¶ 4.
[20] Id, ¶ 5.
[21] *Cable Communications Board v. Nor-west Cable Communications Partnership*, 356 N.W.2d 658, 667 (Minn. 1984); Order of Administrative Law Judge in *In the Matter of the Petition for Review of the Minnesota Department of Commerce Policy Pronouncement and Guidance Document Regarding Insurance/Credit Scoring Filings*, OAH Docket No. 1-1004-15233-2 (2003) at 3.
[22] *Sellner Manufacturing Co. v. Commissioner of Taxation*, 202 N.W.2d 886, 888-89 (Minn. 1972).
[23] The issue in this case is not whether there are reasons why it might be wise to have an Administrative Law Judge who is independent of the Board preside at hearings like the one involved here, or whether due process principles require such a hearing. In general, Administrative Law Judges lack authority to make a declaration of unconstitutionality since that power is vested in the judicial branch. *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 368 (Minn. 1977); *Starkweather v. Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *In the Matter of Rochester Ambulance Service*, 500 N.W.2d 495 (Minn. App. 1993).
[24] G. Beck, M.B. Gossman, & L. Nehl-Trueman, *Minnesota Administrative Procedure*, § 1.2 (2d ed. 1998).
[25] *Id*. (see 1945 Minn. Laws ch. 452, §2).
[26] *Id*. (see 1957 Minn. Laws ch. 806, §1, subd. 3).
[27] *See* Minn. Stat. § 15.0418 (1974).
[28] *See* G. Beck, et al, Minnesota Administrative Procedure, § 1.3.
[29] G. Beck, et al., *Minnesota Administrative Procedure*, § 1.4.
[30] *See* 1975 Minn. Laws ch. 380, § 16; Minn. Stat. § 15.052 (1976).
[31] 1975 Minn. Laws, Ch. 380, § 23.
[32] *Compare* Minn. Stat. § 15.0418 (1976) *with* 15.0418 (1974). That language was deleted from the statute as part of a bill enacted in 1976. See 1976 Minn. Laws ch. 68, § 3.
[33] *See* 1982 Minn. Laws, ch. 424, § 130.
[34] See Minn. Stat. Ch. 14 (1982).
[35] See 1980 Minn. Laws ch. 615, § 26.
[36] See 1984 Minn. Laws ch. 640, § 32.
[37] *See* Minn. Stat. 15.0411, subd. 4 (1974 – 1980); Minn. Stat. § 14.02, subd. 3 (1982 – 2004). The definition was modified in 1976 to exclude certain inmate hearings held by the Department of Corrections.
[38] See 1974 Minn. Laws, ch. 470.
[39] The Board was then called the Ethics Commission. Its name was later changed to the Ethical Practices Board (see 1975 Minn. Laws ch. 271, § 2), and later the Campaign Finance and Public Disclosure Board. For ease of reference, this report will simply refer to the agency as "the Board."
[40] Minn. Stat. § 10A.02, subd. 13 (*see also* 1974 Minn. Laws ch. 470, § 3).
[41] *See* 1978 Minn. Laws, ch. 463, § 27.

[42] According to information on the website of the Minnesota State Law Library, *"Minnesota Rules* was first published in 1983 and the *State Register* in 1976. Before that, publication of rules varied. Each agency originally published its own rules. Between 1970 and 1983, there were several resources that attempted to collect all these rules together. The first was *Minnesota State Regulations* (1970-1976), which was later re-titled *Manual of State Agency Rules* (1976-77). The *Minnesota Code of Agency Rules* (MCAR), published from 1977 to 1982, was a more ambitious attempt at a uniform system of publication, but it never succeeded in creating a unified numbering system. The *Minnesota Code of Agency Rules Reprint* (1982) collected all rules in effect on September 15, 1982, to serve as a standard resource during the transition to *Minnesota Rules*. Until the *Reprint*, rules were updated by removing sections of pages from the binder and replacing them with new pages. As a result, it was not always clear what the date of a specific part of the publication was or when a particular regulation became effective. In addition, since no specific library was charged with the responsibility for collecting these individual publications, much of the historical record has been lost." *See* www.lawlibrary.state.mn.us/rules.html .

[43] *See* Feb. 28, 1975, Statement in Support of the Proposed Hearing Rules and Regulations appended to the Board's April 21, 2005, letter to the Administrative Law Judge.

[44] *Id.*

[45] *See* Nov. 24, 1986, and Nov. 30, 1987, Statements of Need and Reasonableness appended to the Board's April 21, 2005, letter. The Petitioners located and provided copies of EC 601-623 and the State Register notice relating to the repeal of those rules. *See* attachments to the Petitioner's April 25, 2005, letter to the Administrative Law Judge.

[46] 1 State Reg. 1579 (May 2, 1977), appended to Petitioner's April 25, 2005, letter.

[47] EC 603(b)(4) specified that, "At any time during an investigation or audit, the Commission, in its discretion, may hold a contested case hearing pursuant to these rules before making a finding on any investigation or audit."

[48] The headnote included in the Minn. Stat. § 10A.02, subd. 13 (which refers to "rules"), is not part of the statute and has no substantive effect. *See* Minn. Stat. § 645.49.

[49] 289 Minn. 165, 183 N.W.2d 545, 548 (Minn. 1971).

[50] According to the definitions set forth in Minn. R. 4525.0100, subp. 3, "'[c]ontested case' means a proceeding before the board in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after a board hearing." The rule goes on to identify certain types of proceedings that shall be considered contested case proceedings, including "a hearing ordered by the board under part 4525.0900, subpart 2 concerning a complaint, investigation, or audit, and any other hearing which may be ordered by the board under parts 4525.0100 to 4525.1000 or which may be required by law." Minn. Stat. § 14.02, subd. 3, states that "'[c]ontested case' means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." The definitions are identical except that the Board's definition is specific to the Board while the APA definition is written in a more generic fashion to apply to any agency. Moreover, the reference to a "proceeding before the board" in 4525.0100 does not necessarily mean that no ALJ is to be involved, sine the APA also refers to a "proceedings before an agency."

[51] Cable Communications Board v. Nor-West Cable Communications Partnership, 356 N.W.2d 658, 665 (Minn. 1984); People's Cooperative Power Association, Inc. v. City of Rochester, 447 N.W.2d 11, 13 (Minn. App. 1989).

[52] Minn. Stat. § 14.03, subd. 1, states that the APA does not apply to agencies in the legislative or judicial branches, emergency powers in Minn. Stat. § 12.31-12.37, the Department of Military Affairs, the Comprehensive Health Association, the Tax Court, or the regents of the University of Minnesota. Minn. Stat. § 14.03, subd. 2, specifies that the contested case procedures of the APA set forth in Minn. Stat. §§ 14.57 to 14.69 do not apply to certain types of proceedings, such as matters arising under the unemployment insurance program, Social Security disability determinations, Workers' Compensation cases, and Corrections and Board of Pardons cases, and certain proceedings under Chapter 414. Neither of these provisions exempts proceedings before the Campaign Finance and Public Disclosure Board from the APA or its contested case procedures.

[53] See Nov. 24, 1986, SONAR at 3-4; Minn. Rules 4525.0600 (1985); 11 State Reg. 1030 (Dec. 8, 1986); 11 State Reg. 1611 (March 9, 1987).

[54] *See* Nov. 30, 1987, SONAR at 3.

[55] Compare the MPCA rule (Minn. R. 7000.1900, subd. 1) involved in *In re Max Schwarzman & Sons*, 670 N.W.2d 746, 757 (Minn. App. 2003), and the PUC rule (Minn. R. 7829.1000) involved in *In Re Peoples Coop. Power Ass'*n, 447 N.W.2d 11, 13 (Minn. App. 1989), *rev. denied* (Minn. 1990). Both of these rules expressly state that a contested case hearing will only be granted if there is a material issue of fact in dispute.

[56] *See* Minn. R. 1400.5500(K), which authorizes the Administrative Law Judge to "recommend a summary disposition of the case or any part thereof where there is no genuine issue as to any material fact . . . ."

[57] Minn. Stat. § 14.02, subd. 4.

[58] In the current case, the Board has already granted the Petitioner's application for a contested case hearing. As a result, there is no need to address the question of whether the Board is required to permit a contested case hearing in circumstances like this.